INTERIOR BOARD OF INDIAN APPEALS

Estate of Johnnie Holmes

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF JOHNNIE HOLMES

IBIA 75-50 Decided October 31, 1975

Petition to reopen.

Denied.

1. Indian Probate: Reopening: Generally

   In the absence of a showing that a manifest injustice is possible if a case closed for more than 3 years is not reopened, a petition for reopening will not be allowed.

2. Indian Probate: Reopening: Generally

   When the evidence before the examiner was uncontradicted as to the factual determination of marriage, and a request for reopening exceeds by 22 years an

uncontested determination of heirship, the usual reluctance to avoid disturbance of a fact-finder's decision takes on greater emphasis.

3. Indian Probate: Evidence: Presumptions--Indian Probate: Evidence: Proof of Marriage

Although the marriage provisions of a law and order code may be interpreted as recognizing as valid only marriages accomplished by licensing and ceremony, there is a strong public policy favoring marriage which advises that a marriage should be presumed valid unless disproved. This presumption has been extended to marriage by Indian custom.

4. Indian Probate: Marriage: Proof of Marriage

Where a law and order code contains no express provision nullifying an Indian custom marriage and where state law affirmatively recognizes such marriage, an uncontested determination of heirship

handed down two decades ago which is consistent with state law respecting valid marriages, ought not be disturbed.

5. Indian Probate: Reopening: Generally

Even if petitioners were entitled to their requested relief, which is unsupported by the record, an untimely petition can be denied--even for a petitioner who was not given an opportunity to be heard in the original proceeding.

APPEARANCES: Callis A. Caldwell, Attorney for Jerry Humpy and Elaine H. Browning.

OPINION BY ADMINISTRATIVE JUDGE HORTON

This matter comes before the Board upon a petition for reopening of probate filed by Callis A. Caldwell Esq., for and in behalf of Jerry Humpy and Elaine H. Browning, pursuant to 43 CFR 4.242.

The petition for reopening was filed February 21, 1975. A final decision probating the estate at issue was entered

January 19, 1953. Accordingly, the petition was forwarded to the Board by Administrative Law Judge William E. Hammett as authorized by 43 CFR 2.242(h) "[i]f a petition for reopening is filed more than 3 years after the entry of a final decision in a probate * * *."

The Administrative Law Judge recommended against reopening this case in his forwarding statement dated February 25, 1975. For the reasons set forth herein, the Board concurs with the recommendation that the petition to reopen be denied.

The petitioners allege they are entitled to a greater share of the estate previously probated in the will of Johnnie Holmes, Fort Hall Allottee No. 1077, whose trust property was devised in an approved will naming Elizabeth Humphrey of Owyhee, Nevada (a/k/a Elizabeth Humpy and Elizabeth Dodge), as sole beneficiary. Elizabeth Humphrey died shortly after the testator and before the hearing of June 4, 1952, determining the lawful inheritors of Holmes' property. Since Elizabeth Humphrey died intestate, the above hearing involved an inquiry into her marital status and the identity of lineal descendants.

In an Order Approving Will and Determining Heirs of Subsequently Deceased Devisee, entered January 19, 1953, the Examiner of Inheritance determined that at the time of her death Elizabeth Humphrey was survived by a spouse, Johnnie Dodge, two sons, Jim and

Harold Humpy, and two daughters, Amelia Humpy, who died prior to the June 4, 1952, hearing, and Elaine R. Browning, one of the petitioners. In accordance with Idaho law, where the trust property was situated, each of the four children was awarded a one-sixth share in the estate of the deceased-devisee and the surviving spouse obtained a two-sixths share. The other petitioner in the case at hand, Jerry Humpy, is a grandson of Elizabeth Humphrey and the son of Amelia Humpy, named above.

Petitioners, Jerry Humpy and Elaine Browning, Shoshone Indian, claim that the initial order determining heirs of Elizabeth Humphrey in the probate of the Johnnie Holmes estate erroneously concluded that Elizabeth Humphrey was the wife of Johnnie Dodge. It is their request, therefore, that the case be reopened for a new factual determination.

At the outset, it is apparent that Elaine H. Browning lacks standing to petition the Board for reopening. Her affidavit in support of the petition, and the transcript of hearing, indicate her appearance at the June 4, 1952, hearing. Accordingly, whatever direct information she possesses regarding the relationship between Johnnie Dodge and Elizabeth Humphrey could have been presented at the time of her prior testimony. Elaine Brownings' affidavit attached to the petition states that, because of her poor English, she did not really know what was going on at the hearing in question. The transcript reflects, however, that a

Shoshone interpreter was present at the hearing in addition to her English-speaking brother, Jim Humpy.

With respect to the merits of the charge now brought by the petitioners, the Board is understandably inclined to favor testimony preserved at the hearing over evidentiary challenges raised more than 22 years after the issue was examined. In this regard, the sworn testimony of Jim Humpy, one of Elizabeth Humphrey's two sons who resided in Owyhee, Nevada, at the time of her death, indicates his clear-cut assessment that Elizabeth Humphrey and Johnnie Dodge were husband and wife and that they had married "the Indian way" (Tr., p. 2). It is also significant that in the only testimony provided by petitioner Elaine Browning at the hearing, she advised the Examiner to talk to her brother, Jim Humpy, because he "knows more" (Tr., p. 1). Elaine Browning's residence at the time of her mother's death was Pocatello, Idaho.

Petitioner Jerry Humpy, who alleges he was in California at the time of the June 4, 1952, hearing and had no actual notice of the proceeding, urges reopening on the grounds that as a youth, he lived with his grandmother, Elizabeth Humphrey, and that, in his opinion, Johnnie Dodge was only a frequent overnight guest at his grandmother's home and not her husband.

[1] In the absence of a showing that a manifest injustice is possible if a case closed for more than 3 years is not reopened,

a petition for reopening will not be allowed. 43 CFR 2.2412(h); Estate of Sophie Iron Beaver Fisherman (Cheyenne River No. 2335, Deceased), 2 IBIA 83, 80 I.D. 665 (1973).

[2] When the evidence before the Examiner was uncontradicted as to the factual determination of marriage, and a request for reopening exceeds by 22 years an uncontested determination of heirship, the usual reluctance to avoid disturbance of a fact-finder's decision takes on greater emphasis. See Estates of Teddy Punlay and Haw-wau-na-ha-sun-ah, IA-8 (October 6, 1949, and April 7, 1950) in which a petition to reopen on grounds a marriage was erroneously established was denied where the petition was not filed for 35 years and the moving party acquiesced during this period in the original finding.

Here, the petitioners submit a further challenge to the standing order affecting this estate by alleging that Indian-custom marriages are not recognized in Owyhee, Nevada, and that the records show no evidence of a marriage license.

The Board has been provided a copy of the pertinent sections of the law and order code followed from 1950-53 by the Duck Valley Tribal Court. Section 1, Chapter 3 of this code, which deals with domestic relations, provides that "[a]ll Indian marriages and divorces, whether consummated in accordance with the State law or in accordance with tribal custom, shall be recorded within

three months at the Western Shoshone Agency." Section 2, Chapter 3 directs, in pertinent part, that all marriages shall be on authority of licenses and that a ceremony shall be performed, in the case of tribal licenses by the Judge of the Shoshone-Paiute Indian Court.

[3] Although the marriage provisions of a law and order code may be interpreted as recognizing as valid only marriages accomplished by licensing and ceremony, there is a strong public policy favoring marriage which advises that a marriage should be presumed valid unless destroyed. See 35 Am. Jur. Marriage, Sec. 3, p. 181. This presumption has been extended to marriage by Indian custom. Chancey v. Whinnery, 47 Okl. 272, 147 P. 1036 (1915).

In Nevada, where Elizabeth Humphrey and Johnnie Dodge were domiciled, state courts since 1896 have upheld the validity of common-law marriages, including marriages by Indian custom, even where the law required certain formal preliminaries found not to be complied with, on grounds that the statute or law in question contained no express clause of nullity. State v. Zichfeld, 23 Nev. 304, 46 P. 802 (1896); Ponina v. Leland, 185 Nev. 263, 454 P.2d 16 (1969).

It is not considered necessary in disfavoring this petition to determine whether the law and order code of the Western Shoshone Indians nullifies an otherwise traditional Indian-custom marriage.

The code would seem susceptible to varying interpretations. Instead, the overriding consideration in the review of this petition centers on the legal and practical obstacles to disturbing an Examiner's finding rendered over 22 years ago which was supported by uncontradicted testimony.

[4] Thus, where a law and order code contains no express provision nullifying an Indian-custom marriage and where state law affirmatively recognizes such marriage, an uncontested determination of heirship handed down two decades ago which is consistent with state law respecting valid marriages, ought not be disturbed.

[5] Further, even if petitioners were entitled to their requested relief, which is unsupported by the record, an untimely petition can be denied--even for a petitioner who was not given an opportunity to be heard in the original proceeding. Estate of Ke-i-ze or Julian Sandoval (Navajo Allottee No. 12253, Deceased), 4 IBIA 115 (August 18, 1975). When applied, this strict rule is founded upon the two-fold consideration that 1) the public interest is served by leaving undisturbed Indian probate decisions of long standing, and hence the stability of titles, and 2) the doctrine that nondiligent actions should not be rewarded.

Whether the above rule presents additional grounds in this action for disallowing the petitioners' request is contingent on

whether a manifest injustice would be possible if their petition is denied. Here it is assertable that a manifest injustice could be presumed if there is no reasonable basis for concluding that Johnnie Dodge was married to Elizabeth Humphrey. Such is clearly not the case. Moreover, an injustice might be done by permitting a belated attack on the form or fact of marriage previously established, particularly when the disputed husband is no longer living.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition to Reopen filed by Jerry Humpy and Elaine H. Browning be, and the same is hereby, DENIED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Wm. Philip Horton
Administrative Judge

I concur:

//original signed
Alexander H. Wilson
Administrative Judge